

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA,)
 Plaintiff,) Case No:
) 5:16-cr-94-01
 vs.)
BRIAN FOLKS,)
 Defendant.)

MOTION FOR HEARING
REGARDING VIOLATION OF DISCOVERY
PROTECTIVE AGREEMENT
Monday, February 26, 2018
Burlington, Vermont

BEFORE:

THE HONORABLE GEOFFREY W. CRAWFORD
Chief Judge

APPEARANCES:

ABIGAIL E. AVERBACH, ESQUIRE
U.S. Attorney's Office
P.O. Box 570
Burlington, VT 05402
Attorney for the Government

JARED FISHMAN, ESQUIRE
Civil Rights Division Criminal Section
U.S. Department of Justice
601 D Street, N.W., 5th Floor
Washington, DC 20530
Attorney for the Government

CAPITOL COURT REPORTERS, INC.
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BURLINGTON, VERMONT 05402-0329
(802/800) 863-6067
E-MAIL: info@capitolcourtreporters.com

1 Appearances continued:

2 DAVID J. WILLIAMS, ESQUIRE
3 JARVIS, McARTHUR & WILLIAMS
4 95 St. Paul Street
5 P.O. Box 902
6 Burlington, VT 05402
7 Attorney for the Defendant

8 WILLIAM E. KRAHAM, ESQUIRE
9 15 Grove Street
10 P.O. Box 447
11 Brattleboro, VT 05302-0447
12 Attorney for the Defendant

13 Lisa Wright, Operations Specialist
14 Kim U. Sears, RPR

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1 MONDAY, FEBRUARY 26, 2018

2 (The following was held in open court at 2:02 p.m.)

3 MS. WRIGHT: Your Honor, this is Criminal
4 Number 16-94, Defendant Number One. United States of
5 America versus Brian Folks. The Government is present
6 through Assistant United States Attorney Abigail Averbach
7 and Jared Fishman. Attorney Fishman is participating by
8 telephone. Present for the Defendant is Attorney David
9 Williams and William Kraham; Attorney Kraham participating
10 by telephone.

11 The matter before the Court is an emergency
12 motion regarding violation of discovery protective order.

13 THE COURT: All right. Good afternoon.
14 Good to see everybody.

15 MS. AVERBACH: Good afternoon, Your Honor.

16 THE COURT: Ms. Averbach, do you have an
17 unredacted copy of the Facebook filing that I can see?
18 Because mine is blacked out. It's hard to understand what
19 we are looking at.

20 MS. AVERBACH: Certainly, Your Honor. I do
21 have a black and white copy which I'll --

22 THE COURT: That's all right. All right.
23 For the record it's Exhibit 4. And I'll make it a sealed
24 exhibit, but that way we will have a complete account of
25 what's going on.

1 I'll turn things over to you, Ms. Averbach.

2 Do you want to add anything to your papers?

3 MS. AVERBACH: I would, Your Honor. Thank
4 you. Would you prefer that I'm back here or at the
5 podium?

6 THE COURT: I think it's fine. Since we
7 have two people on the phone, it might be easiest if you
8 sit and speak sort of directly into the mic. I'll bet
9 they will pick up better.

10 MS. AVERBACH: May I stand and speak
11 directly into the mic?

12 THE COURT: You may.

13 MS. AVERBACH: I'm an attorney, so I'm used
14 to being on my feet.

15 THE COURT: All right. If the people on
16 the phone can't understand this, let me know. Okay? Can
17 you hear all right, Mr. Kraham?

18 MR. KRAHAM: Yes, I can hear fine.

19 THE COURT: Mr. Fishman.

20 MR. FISHMAN: Yeah, sounds good.

21 THE COURT: Good. All right. Thanks.

22 MS. AVERBACH: Well thank you, Your Honor.
23 Thank you for your indulgence in granting the emergency
24 hearing. As Your Honor is aware, we had a protective
25 order agreement in this case. That was signed on June

1 1st, 2017 by Mr. Kraham and on February, I believe, 13th,
2 2018 by Mr. Williams. The protective order agreement
3 applied to counsel. It applies to the investigators and
4 staff in the lawyers' offices who are working on the case.
5 And it applied also to the Defendant. It covers all the
6 discovery, and it specifically covered by reference in the
7 letters disclosing our witness list the witness names,
8 those testifying at trial in this case. That list was
9 provided to counsel, to two people, to Mr. Williams, and
10 Mr. Kraham, on February 2nd this year.

11 The order agreement -- effective order
12 agreement specifically states that: The names of
13 witnesses in the case are being protected from public
14 disclosure with the following language, Your Honor.
15 "Discovery victim and witness names shall not be
16 disseminated to anyone outside defense counsels' firm and
17 its investigators and contractors who are working on this
18 matter, including but not limited to the press, any such
19 investigator or contractors are bound by the same
20 restrictions. Defense counsel may share summaries and
21 excerpts with anyone, provided the victim and witness
22 names are redacted. Defense counsel must refrain from
23 using any victim's full or actual name in any publication,
24 document or filing as well as making reference to victim's
25 full or actual name in any public hearing, and counsel

1 should adhere to the name convections in the governing
2 indictment or upon further agreement in any other manner
3 acceptable to the Government."

4 It also specifically requires "That the
5 Defendant not be left alone with any of the documents,
6 including the witness list. The Defendant may review the
7 discovery in the presence of defense counsel, other
8 members of counsels' firm, or counsels' investigators,
9 contractors working on this matter, but may not otherwise
10 access these materials and may not retain even temporarily
11 the materials."

12 And also specifically requires -- rather it
13 excludes spouses, et cetera, from the limited universe of
14 people who are allowed access to these documents. It says
15 "For purposes of these restrictions, investigators and
16 contractors shall not include spouses, significant others,
17 friends, or associates of the Defendant."

18 And finally, it notes that "A copy of this
19 letter shall be provided by defense counsel to the
20 Defendant, and then if either counsel or the Defendant
21 decline to accept any of the terms, we know that we will
22 make discovery available for an inspection at our office
23 in compliance with our constitutional mandates."

24 On Friday of last week, Your Honor, the
25 Government learned that our witness list was posted to

1 Facebook, publicly on the Internet. We had a screen shot
2 of this witness list that shows that somebody took a cell
3 phone picture of every single page of our witness list
4 that was provided to counsel by discovery letter, and it's
5 clear that the screen shot was taken during the review of
6 discovery, because there is a redacted DEA-6 behind the
7 picture of the witness list.

8 So there are serious ramifications to this
9 in a criminal case, Your Honor. Not only do we have
10 extraordinary safety concerns in this particular case,
11 given the Defendant's prior conviction for manslaughter as
12 well as the nature of the violence inherent in this
13 particular case and privacy concerns with respect to the
14 fact that many of the people on that list are victims of
15 sex crimes and human trafficking, but there is also
16 serious impacts with the Government's ability to move
17 forward. The only purpose of disseminating the list such
18 as this is to quiet these witnesses, to intimidate them,
19 to harass them, and to not cooperate with the Government
20 and not be able to testify at trial.

21 The Government's been successful in getting
22 Facebook's help to identify public postings of this
23 document, and they agreed to take them down by treating
24 our protective order agreement as if it were a court
25 order. But what we can't do is account for anyone who

1 does a screen shot of a posting of their cell phone and
2 then texted it to another person, which I just learned
3 recently, and it still is happening, people are emailing
4 it from one to another privately without using Facebook or
5 any other means. So this is a bell that can't be unrung,
6 and the damage has been done.

7 The Government wishes that the Court treat
8 this agreement as if it were a court order and violation
9 of the agreement as if it were a violation of its own
10 order. In this district we enter into these agreements
11 because we rely in good faith on counsel for the defense
12 to honor the parties of the agreement as if it were a
13 contract. And if we can't rely in good faith on that
14 document, on that agreement, we have to enter into an
15 order of the court.

16 The Government asks the Court adopt the
17 agreement that we had in this case as an order, and we can
18 file a document and motion for protective order if that's
19 preferable to Your Honor. We believe that counsel should
20 be obligated to tell this Court what happened, how this
21 happened, who had access to this document. We need a list
22 of names of who had access and when they accessed it and
23 what connection the people had to Defendant.

24 If this was an act of negligence on the
25 part of counsel or counsels' team, there should be an

1 adequate response. If this was a knowing and intentional
2 act on the part of anyone within the defense team, there
3 should also be an adequate response to that too.

4 In the Government's view there are two
5 parts to this. There is the breach of the information,
6 and then there is the posting on the Internet of the
7 information. Somebody deliberately posted this on the
8 Internet, on Facebook, in an effort to intimidate, harass,
9 embarrass and implicitly threaten the safety of the
10 witnesses, the Government's witnesses. That's the
11 obstruction of justice, Your Honor. The Government's
12 undertaking its own investigation.

13 We ask that this Court take all necessary
14 steps to ensure that this doesn't happen again, and to
15 address this seriously, and to let the defense team know
16 that this Court takes any breach of these agreements
17 seriously. We note we did reach out to counsel today
18 before the hearing. Spoke to Mr. Williams, spoke briefly
19 with Mr. Kraham, who has suffered a recent loss of his
20 father, and who I believe hadn't yet even read the motion
21 papers. So we don't have substantive answers from Mr.
22 Kraham. We have asked these questions of Mr. Williams.
23 We ask the Court to make its own inquiry and satisfy
24 itself that all parties have acted in good faith and that
25 all negligence and future breaches of the agreement will

1 not be tolerated. Thank you.

2 THE COURT: All right. Mr. Williams, how
3 do you see it?

4 MR. WILLIAMS: Your Honor, I met with Mr.
5 Folks once here in the court building for the January 31
6 arraignment on the superseding indictment, the
7 arraignment. At that time I gave him a copy of that
8 indictment. Nothing else.

9 THE COURT: Right.

10 MR. WILLIAMS: I received a copy of his
11 letter. For whatever reason I kept the mailer; on Monday,
12 February 5. I have the original copy in a folder. It's
13 never left this folder. It's always been in my
14 possession. It hasn't been photographed by anyone.

15 And I have not been to Springfield to visit
16 with Mr. Folks nor have I corresponded with him.

17 THE COURT: Okay. So from your perspective
18 you got the witness list when?

19 MR. WILLIAMS: If I read this mailer
20 correctly --

21 THE COURT: Right.

22 MR. WILLIAMS: -- it was sent out on the
23 2nd, which looks like a Friday. I'm not sure, because it
24 said Monday, February 5 at 3 p.m. it was going to be
25 delivered to my office.

THE COURT: Okay. And you haven't shown it
to Mr. Folks or been down to see him?

3 MR. WILLIAMS: No. I haven't seen him
4 since the 31st. I've got the original copy of the letter.
5 I've shown it to Ms. Averbach, and I have no explanation
6 for what happened.

7 THE COURT: All right. And anybody in your
8 office that has been involved in --

15 THE COURT: Mr. Graham?

16 MR. KRAHAM: Yes, Your Honor. First, thank
17 you for allowing me to participate by telephone. I wanted
18 to correct something in the Government's motion. Exhibit
19 1 is not the letter that I signed. I believe that letter
20 was signed by Kevin Henry on behalf of Donald McFarlan. I
21 signed the letter on June 1. And I just sent a copy to
22 Ms. Averbach by email just prior to the hearing.

23 THE COURT: She has corrected that, and I
24 have a copy of the letter that bears your signature.

25 MR. KRAHAM: Okay. Now ordinarily I would

1 respectfully decline to provide any information regarding
2 any communications with my client on the ground of
3 attorney/client privilege. However, the privilege does
4 not apply, in my view, if my client is involved in
5 criminal acts or I need to respond to allegations
6 concerning my representation of Mr. Folks.

7 So let me provide the Government and the
8 Court with the information that I have. My last face-to-
9 face visit with Mr. Folks at the Southern State
10 Correctional Facility was on Saturday, February 3d, for
11 about three hours. I received this discovery letter on --
12 by Fed Ex on Monday, February 5, 2018. I scanned it, and
13 I made a copy, and I likely stamped it with my copy stamp.

14 It arrived during the week where I was
15 working on the Folks' case sometimes past midnight,
16 conducting legal briefs search and write motions in order
17 to meet the deadline of February 9. I sent Mr. Folks a
18 copy of the letter either separately or in an envelope
19 along with copies of one or more of the motions responding
20 in this case.

21 Now I have sent him copies of discovery
22 letters in the past because they contained an index
23 listing the discovery materials produced by date, Bates
24 number and description. So that he knows, in general, the
25 kind of material that I am receiving, and then he can tell

1 me what he wants to review, and I go to the correctional
2 facility with my notebook, my laptop, and review the
3 discovery with him. And I have been very careful to abide
4 by the terms of the protective order and not provide any
5 of the discovery material.

6 The letter of February 5 was different from
7 the other discovery letters because it not only contained
8 updates regarding discovery and indices regarding new
9 discovery material, but also has a list of trial witnesses
10 embedded inside. That absolutely should not have been
11 sent to the Defendant. It was a mistake, and I regret my
12 error and my carelessness.

13 My last contact with Mr. Folks was on
14 Monday, February 12, on the attorney telephone line, and
15 he did not discuss this discovery letter at all. I was
16 calling in to tell him that I was leaving the next day for
17 Maryland to take care of my dad, and I would be back in
18 touch with him when I returned. Now I learned today that
19 Mr. Folks sent the discovery letter to his wife, Cassandra
20 Folks. I do not know how it came to be posted on
21 Facebook. And Ms. Averbach mentioned that in the Facebook
22 posting there is a DEA-6 in the background. It appears to
23 me that in the lower right-hand corner that has a
24 Government exhibit sticker on it. So that may be a
25 document from Mr. Folks's detention hearing which he would

1 have obtained from prior counsel before I entered the
2 case. I don't know what that document is.

3 That's the only information I have about
4 the letter, Your Honor.

5 THE COURT: And how would Mr. Folks have
6 access to a cell phone or a photocopier to send this on to
7 his wife?

8 MR. KRAHAM: He doesn't. He actually had a
9 physical copy of the letter. Because I sent it to him.
10 And he sent it to his wife.

11 THE COURT: Okay. But your physical copy
12 of the letter didn't have the DEA exhibit attached to it,
13 right?

14 MR. KRAHAM: No, no. Not at all.

15 THE COURT: Oh, I see. So that's something
16 that he must also have sent to his wife?

17 MR. KRAHAM: That must have been some other
18 document that he sent his wife on some other occasion.
19 Totally unconnected to the letter as far as I know.

20 THE COURT: All right. I think that brings
21 the first step to a conclusion. We know how Mr. Folks got
22 it, and we know how it got out into the public. So that
23 takes us to a second step which is, Ms. Averbach, what
24 would you like to do about it?

25 MS. AVERBACH: Well I certainly appreciate

1 counsels' candor in responding to the questions. Your
2 Honor, it saves us quite a bit of work. And we can fully
3 investigate what is, in our view, the more serious breach
4 here which is the intentional act of posting it on the
5 Internet.

6 THE COURT: Right.

7 MS. AVERBACH: That said, we are loath to
8 turn over Jencks material, Giglio material in an
9 environment where we can't be certain that we can protect
10 the identity and anonymity and statements of our
11 witnesses. So we will undertake a case-by-case review of
12 our discovery, and by case-by-case I mean document-by-
13 document review of our discovery, and likely make fewer
14 documents -- likely disclose fewer documents and make more
15 documents available for review in our office.

16 THE COURT: So the same set of documents as
17 seen by defense counsel, just some of them they will see
18 in your office.

19 MS. AVERBACH: Correct.

20 THE COURT: Got it. Anything else?

21 MS. AVERBACH: Your Honor, I would ask that
22 you enter the protective agreement as an order. And I
23 don't believe that sanctions are necessary in this case.
24 It sounds inadvertent; with serious ramifications. But if
25 Your Honor sees any other solution, or remedy, as

1 appropriate, happy to hear it.

2 THE COURT: All right. Mr. Williams, what
3 should we do about it? This is how people get killed;
4 right? I mean it's not a trivial matter.

5 MR. WILLIAMS: I was dismayed to learn that
6 this had happened. I don't know what to do. I take my
7 obligations as a defense lawyer, as you know, very
8 seriously, and I don't take any risks that might affect
9 somebody's health and well-being.

10 THE COURT: Right.

11 MR. WILLIAMS: And I don't know what to
12 say.

13 THE COURT: Any objection to the entry of
14 your letter agreement as a protective order?

15 MR. WILLIAMS: No, not at all.

16 THE COURT: Any objection to in this case
17 going forward viewing sensitive Brady and similar material
18 at the U.S. Attorney's office?

19 MR. WILLIAMS: Well, you know, I have been
20 thinking about it over the weekend. Ms. Averbach or --
21 the Government's motion indicated that they were going to
22 require us to review all of Jencks and Giglio at their
23 office. At some point we are going to have physical
24 control over those documents at the trial. There is no
25 way I can cross examine a witness without having the

1 physical document in my control.

2 More importantly, I don't see how I can
3 adequately prepare witness cross examinations without
4 having those documents with me. As you know, I'm very
5 busy, and I work at nights and on the weekends and
6 especially getting ready for trial. We tried a case
7 together last year. You know how --

8 THE COURT: Right. Yeah, no. I totally
9 respect you. That goes without saying.

10 MR. WILLIAMS: You know how organized I
11 was. I had a witness notebook for everyone of those
12 witnesses that was called, cross referenced statements
13 made by the witness and by other witnesses, and without
14 having the documents in front of me when I need them, I
15 don't know -- you know, there is a lot of witnesses, and
16 some are less important than others.

17 THE COURT: Right.

18 MR. WILLIAMS: As I say, I take --

19 MR. FISHMAN: It's difficult to hear Mr.
20 Williams. Can you get closer to the microphone?

21 MR. WILLIAMS: I take my obligations
22 seriously. Nothing that is going to be given to me is
23 going to go anywhere. And when it has -- I don't know
24 whether you're familiar with the Aguiar litigation.

25 THE COURT: No.

1 MR. WILLIAMS: I had a client that was
2 sending threatening letters to co-defendants based on my
3 conversations with him pretrial. And I cut him off from
4 even reviewing Jencks and Giglio material in jail, and
5 that was litigated on a post-conviction relief. And my
6 decision to cut him off because of his behavior was
7 affirmed by Judge Conroy and later by Judge Sessions. So
8 I don't put up with it. There is no reason to. But I've
9 got an obligation to prepare the best I can to cross
10 examine important witnesses, and I don't think I can do it
11 if I'm locked in a room up here. I don't know whether
12 they are going to make the room available on the weekends
13 and nights. I don't know.

14 THE COURT: Yeah. All right.

15 MR. WILLIAMS: I certainly will abide by
16 any order Your Honor gives to me, so -- and I have been
17 doing this for a very long time. And I've never violated
18 a court order.

19 THE COURT: All right. Thank you. Mr.
20 Kraham? Same question. You know how serious this is.
21 This is how people are harassed and killed. How are we
22 going to prevent this going forward?

23 MR. KRAHAM: Well based on what's happened
24 I think I am required to file a motion to withdraw, and
25 I'll put my reasons in the motion.

1 THE COURT: All right. I guess that would
2 answer the question. Are you able to go forward, Mr.
3 Williams, on your own?

4 MR. WILLIAMS: Not in April. There is no
5 way. I'm the copilot. I got involved just a few weeks
6 ago.

7 THE COURT: Yeah.

8 MR. WILLIAMS: The discovery on -- in this
9 case is -- Mr. Kraham sent to me on a computer hard drive,
10 and we are going through it. But --

11 THE COURT: Yeah.

12 MR. WILLIAMS: I can't get this case ready
13 for trial in April.

14 THE COURT: Well we will take Mr. Kraham's
15 motion up. Setting aside that issue, Mr. Kraham, how are
16 we going to protect against this in the future?

17 MR. KRAHAM: Well I agree with Mr.
18 Williams, it would be extremely difficult to prepare the
19 case for trial if we were forced to review discovery in
20 the U.S. Attorney's office, because I would need a
21 considerable amount of time with the documents in my
22 office in order to adequately prepare. And if the Court
23 denies my motion to withdraw, which I will file tomorrow,
24 then I'm not going to send my client anything.

25 THE COURT: Well that's not what I'm

1 asking, only that you not do the -- I won't raise it with
2 an adjective, but you won't do the action of sending him
3 what's obviously confidential information in such a way
4 that he can send it out into the broader community. I
5 mean so -- an appalling breach of your professional
6 obligation. He doesn't owe those obligations to the
7 Court, but you do.

8 I guess that's as much as we can do at this
9 point. Ms. Averbach, you're set with Facebook? In other
10 words, there is no further order from the court, no show
11 cause contempt hearing that you want to conduct?

12 MS. AVERBACH: Your Honor, with respect to
13 Facebook, we will be in touch if we need further orders
14 from Your Honor.

15 THE COURT: Right.

16 MS. AVERBACH: I believe that Facebook is
17 operating under the theory that our agreement is --

18 THE COURT: Yeah, you explained that.

19 MS. AVERBACH: -- in the order, so they are
20 fine. You know, to the degree we will continue to
21 investigate this, you may hear from us further on out.
22 What I think would be in order, is that we have a hearing
23 with Defendant where Your Honor imparts the seriousness of
24 the protective order to Defendant and issues a no-contact
25 order directly to the Defendant so that he understands the

1 ramifications of this as obstruction of justice, as
2 witness tampering, as any number of different things he
3 could face now.

4 THE COURT: Yeah. That's fair. I'll see
5 him anyway if Mr. Kraham moves to withdraw because that's
6 a motion that requires presence.

7 MS. AVERBACH: Okay.

8 THE COURT: I don't -- his actions concern
9 me less than the attorney's. I mean we expect something
10 different from the lawyers that appear here. And this is
11 as disappointing as anything I've seen in my three
12 and-a-half years in this court. I just -- it had not
13 occurred to me that a lawyer would do this, but it's live
14 and learn. And we will have to figure out a way forward.

15 So when the motion's filed, Mr. Kraham,
16 I'll set a hearing and have Mr. Folks brought to attend.
17 Good enough. Thank you. Thank you both.

18 (Court was in recess at 2:28 p.m.)

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4 C E R T I F I C A T I O N
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6 I certify that the foregoing is a correct
7 transcript from the record of proceedings in the
8 above-entitled matter.
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